FIRST AMENDMENT

McCullen v. Coakley, --- U.S. --- (2014)
Decided June 26, 2014

FACTS: In 2000, Massachusetts enacted a state law "designed to address clashes between abortion opponents and advocates of abortion rights that were occurring outside clinics where abortions were performed." That law established a buffer zone of an 18 foot radius around entrances and driveways. Anyone could come inside that area, but they could not approach another within six feet without consent to give them a leaflet or handbill, or to counsel or educate them. A separate provision prohibited blocking access to the location. In 2007, the statute was being considered inadequate to address problems that were occurring, in particular, that protestors were violating the buffer zone regularly and congregating in the area. Boston police had made only a few arrests, however, and that when prosecutions did occur, they were unsuccessful, because deciding whether a person had approached another intentionally was virtually impossible in the crowded space. In response, Massachusetts amended the statute, creating instead a 35 food fixed buffer zone "from which individuals are categorically excluded." (Only those working at the clinic, patients, public responders and utility workers and those using the sidewalks to reach other destinations were permitted inside the zone.)

The individuals who stand outside such clinics include actual protestors as well as those who engage in "sidewalk counseling," offering alternatives to abortion and assistance. McCullen, the primary petitioner in this case, falls into the latter category. As a result of the 2007 statute, McCullen was no longer able to stand on a 56-foot length of public sidewalk in front of the clinic. Other petitioners, at two other clinics, were prohibited from the one area of the public sidewalk where they might, in fact, be able to influence those coming to the clinic. (In those cases, those coming to the clinics would enter through a private driveway and parking in a private lot, areas they could not enter.) All argue that since the 2007 law took effect, they "have had many fewer conversations and distributed many fewer leaflets." In a related issue, it was noted that the clinics were permitted to hire escorts, and that the escorts would thwart their attempts to talk to the patients by blocking access physically and verbally.

In 2008, McCullen (and the others) sought an injunction; The District Court denied it and the First Circuit Court of Appeals affirmed. After additional legal proceedings, McCullen petitioned for certiorari and the U.S. Supreme Court granted review.

ISSUE: May a fixed buffer zone around an abortion clinic (or other facility) prohibit activity on a public sidewalk or other traditional public fora?

HOLDING: No

DISCUSSION: The Court noted that the very language of the statute limited access to the public sidewalks, areas that occupy a "special position in terms of First

Amendment protection."[1] These public areas, labeled "traditional public fora" – have since time immemorial "been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts be- tween citizens, and discussing public questions.'" The Court noted that such areas "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." In all other means of communication, the hearer can turn away and tune out the message – but not so on the public streets and sidewalk Historically, the court had held that any attempt to restrict speech in that area must be very, very limited, although the government is permitted to "impose reasonable restrictions on the time, place or manner of the speech, so long as the restriction is narrowly drawn and content-neutral.

In this case, McCullen argued that virtually all of the speech that is affected by the law relates to abortion, to which the Court disagreed, as it did not mention the content of speech on its face, and in fact, its primarily purpose was public safety to avoid unsafe interactions between the two sides of the issue. The court noted that "obstructed access and congested sidewalks are problems no matter what caused them," and "compromise public safety." The statute was limited to such locations because there was only a regular problem at such locations.

McCullen also argued that the exemptions to the statute serve to favor one side of the debate over the other. With respect to the speech of the escorts, the Court agreed that if it went beyond the scope of their employment, it would violate the express language of the statute, it might constitute selective enforcement, but that claim was not before the Court.

Finding the case to not be either content nor viewpoint based, it moved on to analyze it under the strict scrutiny standard. The court agreed that although it was legitimate to be concerned about public safety, that the "buffer zones impose serious burdens" on speech by carving out and designating as prohibited significant portions of public sidewalks. McCullen noted that she was forced to raise her voice to be heard by those within that area, which was at odds to the message she wanted to convey. McCullen and the others were forced to stay so far back that by the time they realized an individual was a patient, it was too late to engage in face to face conversation or pass on a leaflet before that individual entered the prohibited zone.

The Court specifically noted that the alternatives offered by the Government, chanting and showing signs, missed the point, as McCullen and the others are not protestors. They believe that their objective can only be met by "personal, caring, consensual conversations." In all three locations, they are not seeking a right to enter private property, but only to stand on the public sidewalks.

The Court agreed that the "buffer zones burden substantially more speech than necessary" to achieve the state's interests. The state already has a law that criminalizes harassment and related conduct. Specific obstructions, too, can be addressed through existing local ordinances that prohibit impeding free travel on public

[1] U.S. v. Grace, 461 U. S. 171(1983).

rights-of-way. Injunctive relief against a particular, offending individual is also a valid option, as it "focuses on the precise individuals and the precise conduct causing a particular problem." Further, since it was acknowledged that there were only a few locations, and that the areas and the parties were well known to local law enforcement, the Court found no reason that they could not take specific action against individuals flouting the law, if necessary.

Further, although agreed that a fixed zone makes it easier for law enforcement, "that is not enough to satisfy the First Amendment" and the need to narrowly tailor such restrictions. Also, the court noted it did not "think that showing intentional obstruction is nearly so difficult in this context as [the state] suggest[s]. To determine whether a protestor intends to block access to a clinic, a police officer need only order him to move. If he refuses, then there is no question that his continued conduct is knowing or intentional." Since a significant police presence has routinely been in place at these locations, detecting lawbreakers should not be difficult.

The Court concluded that sidewalks and other traditional public fora "have hosted discussions about the issues of the day throughout history." Taking the "extreme step of closing a substantial portion of a traditional public forum to all speakers," "without seriously addressing the problem through alternatives," is not consistent with the First Amendment.

The First Circuit's decision is reversed and the case remanded.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/13pdf/12-1168_6k47.pdf